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12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA

14 ALL NIPPON AIRWAYS COMPANY,) Case No. C07-03422 EDL
 15 LTD., Plaintiff,

16 vs.

17
 18 UNITED AIR LINES, INC.,
 19 Defendant.

20 AND RELATED COUNTER-CLAIM
 21

NOTICE OF MOTION AND
 MOTION OF ALL NIPPON
 AIRWAYS COMPANY, LTD. TO
 COMPEL DISCOVERY;
 MEMORANDUM OF POINTS
 AND AUTHORITIES;
 DECLARATION OF MARSHALL
 S. TURNER

Hearing Date: March 11, 2008
 Hearing Time: 9:00 a.m.
 Hearing Place: Courtroom of Hon.
 Elizabeth D. Laporte

22
 23 Plaintiff and Counter-Defendant, ALL NIPPON AIRWAYS COMPANY,
 24 LTD. (hereinafter referred to as "ANA"), by and through its attorneys, Condon &
 25 Forsyth LLP, hereby gives notice that the instant Motion to Compel Discovery will
 26 be heard in the courtroom of the Honorable Elizabeth D. Laporte on March 11,
 27 2008 at 9:00 a.m., or as soon thereafter as this matter may be heard. ANA intends
 28 to move to have the instant motion and UAL's Motion to Compel Discovery heard

1 at the same time.

2 ANA hereby moves this Court pursuant to and in the manner required by
3 Rules 34 and 37 of the Federal Rules of Civil Procedure for an Order: (1)
4 compelling Defendant and Counter-Plaintiff United Air Lines, Inc. ("UAL") to
5 produce documents responsive to ANA's First Set of Document Requests to UAL;
6 (2) compelling UAL to produce documents responsive to ANA's Second Set of
7 Document Requests to UAL; (3) compelling UAL to produce documents
8 responsive to ANA's Document Requests attached to ANA's Notices of
9 Deposition; and (4) awarding ANA the expenses and fees incurred in bringing the
10 instant motion.

11
12 Dated: February 1, 2008

CONDON & FORSYTH LLP

13
14 By: 

MARSHALL S. TURNER (*pro hac vice*)
SCOTT D. CUNNINGHAM

15
16 Attorneys for Plaintiff and Counter-Defendant
17 ALL NIPPON AIRWAYS COMPANY, LTD.

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STATEMENT OF ISSUES TO BE DECIDED

- I WHETHER THIS COURT SHOULD ISSUE AN ORDER COMPELLING UNITED AIR LINES, INC. TO PRODUCE ALL DOCUMENTS RESPONSIVE TO ALL NIPPON AIRWAYS COMPANY, LTD.'S REQUESTS
- II WHETHER THIS COURT SHOULD ISSUE AN ORDER PRECLUDING UNITED AIR LINES, INC. FROM REFERRING TO ANY DOCUMENT NOT TIMELY PRODUCED
- III WHETHER ALL NIPPON AIRWAYS COMPANY, LTD. SHOULD BE AWARDED THE EXPENSES AND FEES INCURRED IN BRINGING THE INSTANT MOTION

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

This action arises out of an accident involving ANA Flight NH007 and UAL Flight UA809 at San Francisco International Airport ("SFO") on October 7, 2003 ("the Accident"). A collision occurred between the two aircraft while ANA Flight NH007 was taxiing under its own power along the centerline of Taxiway A. During the taxi, Flight NH007's right wing collided with the right wing of UAL Flight UA809, which had been pushed back from its gate so that its wing intruded into the path of Flight NH007.

ANA served its First Set of Document Requests to UAL on November 15, 2007. Declaration of Marshall S. Turner (hereinafter "Turner Decl."), Exhibit A. UAL served its Answers to Plaintiff's First Set of Document Requests on December 18, 2007. Turner Decl., Exhibit B. ANA served its Second Set of Document Requests to UAL on December 18, 2007. Turner Decl., Exhibit D. UAL served its Responses to ANA's Second Set of Document Requests on January 16, 2008. Turner Decl., Exhibit E.

UAL's responses consisted of unfounded "boilerplate" objections and evasive responses. Moreover, UAL did not produce a single piece of paper with its responses. Many of UAL's responses indicated that documents concerning individuals would be produced "sufficiently in advance of the deposition of the individual to permit review." *See e.g.*, Turner Decl., Exhibit B. This did not occur. Furthermore, such document requests were directed to UAL, not the deponents, and were due within thirty days of service pursuant to Federal Rules of Civil Procedure Rule 34. This time period expired long before the depositions took place.

ANA made a good faith effort to resolve the issues addressed herein pursuant to the meet and confer required by Rule 37 of the Federal Rules of Civil Procedure

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1 and Local Rule 37-1 and included face-to-face meetings with UAL's counsel on
 2 January 23 and January 24, 2008, during which counsel for UAL stated that
 3 searches would be made for various documents, but not a single piece of paper has
 4 been produced and no explanation has been offered. *See* Turner Decl., Exhibit I.

5 **II. ARGUMENT**

6 **A. ANA's First Set of Document Requests**

7 **1. Requests For Documents Concerning UAL Employees**

8 In its Requests, ANA seeks documents concerning UAL employees directly
 9 involved in the Accident, including the flight crew operating UAL Flight UA809,
 10 the tug driver performing the pushback procedure of UAL Flight UA809, the wing
 11 walker assisting the pushback procedure of UAL Flight UA809, and the Ramp
 12 Tower G Controller who cleared ANA Flight NH007 to taxi and cleared UAL
 13 Flight UA809 to pushback.

14 In Request Nos. 2 through 7, ANA seeks:

15 [T]he personnel and training records for [the UAL employee],
 16 including, but not limited to, all documents reflecting training,
 17 certification, accidents and/or incidents involving [the UAL
 employee], and disciplinary actions.

18 Turner Decl., Exhibit A.

19 To each of such Requests, UAL provided the same response:

20 **ANSWER**

21 Objection; vague, ambiguous, overly broad and unduly
 22 burdensome. Additionally, "personnel files" under California
 23 law, are protected by privacy rights of the individual.
 24 Accordingly, United cannot produce such documentation
 25 without the permission of the individual whose files are being
 26 requested. Without waiving any objection, however, United
 27 will produce under separate cover those portion(s) of the
 individual's file materials they consent to having produced and
 will do so sufficiently in advance of the deposition of the
 individual permit to review.

1 Turner Decl., Exhibit. B.

2 In ANA's Request Nos. 9 through 11, ANA seeks documents concerning
3 UAL's Ramp Tower G Controller Edward Loh, who provided clearance to both
4 aircraft involved in the Accident. ANA seeks, "results and/or records of the urine
5 samples testing;" "results and/or records of any check(s) conducted on Edward Loh
6 for fitness for duty;" and "results and/or records of any physical [and/or]
7 psychological examination conducted on Edward Loh in connection with the
8 Accident." Turner Decl., Exhibit A. In response to these requests, UAL objects
9 that they are overly broad and unduly burdensome. Turner Decl., Exhibit B. UAL
10 further objects on the basis of privacy and indicates that on consent, "these will be
11 provided sufficiently in advance of his deposition for review." Turner Decl.,
12 Exhibit B. These requests remain outstanding.

13 UAL's objections are particularly puzzling with respect to its employees'
14 personnel and training records since UAL requested these same documents from
15 ANA's flight crew. Turner Decl., Exhibit C. Furthermore, UAL vaguely alludes
16 to California privacy law without citing any specific statute or venturing to explain
17 its applicability to this matter. Turner Decl., Exhibit B. Moreover, any privacy
18 concerns would be alleviated had UAL provided ANA with the revised
19 Confidentiality Order as it had agreed to do and was ordered to do at the hearing
20 before this Court on November 13, 2007 and as it was ordered to do by this Court's
21 Order of November 19, 2007.¹

22 With respect to the requests concerning Edward Loh, the narrative of the
23 post-Accident interview with Mr. Loh indicates that:

24 SOR Ed Loh was then dispatched to UA Medical for a fitness
25

26 ¹ The first time UAL's counsel presented a revised Confidentiality Order that was agreed to and
27 ordered by the Court on November 13, 2007 was on January 21, 2008 after Mr. Loh's deposition
28 on January 18, 2008. ANA's counsel immediately signed the revised Order, but UAL's counsel
still has not notified ANA that it has been submitted to the Court for signature.

1 for duty check. A urine sample was taken at that time and he
2 was asked to return Wednesday, Oct. 8 for a further physical.

3 Narrative of Interview with Ed Loh, Turner Decl., Exhibit J.

4 ANA has requested the results of specific tests which were conducted on the
5 UAL Ramp Tower G Controller who cleared both aircraft involved in the Accident
6 to proceed on the routes which led to their collision. Turner Decl., Exhibit A.
7 ANA alleges in the Second Cause of Action in its Complaint that the Accident
8 arose from the negligence of UAL's Ramp Controller. ANA Complaint (Docket
9 No. 1), ¶¶ 32-52. UAL agreed at the meet and confer on January 23 and 24, 2008
10 to produce the analysis of Mr. Loh's urine sample, but has not produced a single
11 document. Turner Decl., Exhibit. I. Accordingly, the documents requested are
12 relevant to this matter and should be produced.

13 UAL's statement that such documents will be produced "sufficiently in
14 advance of the deposition of the individual to permit review" is procedurally
15 improper. These requests were directed to UAL, not to the individuals. Pursuant to
16 Rule 34 of the Federal Rules of Civil Procedure, such documents were due from
17 UAL within thirty days of service of the Request rather than at some undetermined
18 time at which UAL sees fit. *See Burlington Northern & Santa Fe Ry. Co. v. U.S.*
19 *Dist. Court for Dist. of Mont.*, 408 F.3d 1142 (9th Cir. 2005) (litigants should take
20 recourse other than failing to produce documents such as securing a stipulation
21 from the relevant party or applying for a protective order). On the eve of
22 deposition, UAL produced partial personnel files for some of its employees. *See*
23 *Section B, Point 3, below.*

24 Accordingly, it is respectfully submitted that this Court should issue an
25 Order compelling UAL to provide to ANA documents responsive to ANA's
26 Request Nos. 2 through 7 and 9 through 11.

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1 **2. Requests For Documents Concerning The Standard Ground**
 2 **Handling Agreement ("SGHA")**

3 In its Requests, ANA seeks documents concerning the SGHA which UAL
 4 has repeatedly alleged is central to UAL's claims and defenses. Despite being a
 5 party to the agreement and asked to produce all relevant documents, UAL has not
 6 produced a single document with respect to the SGHA and refers only to the
 7 SGHA itself, the only copy of which has been produced by ANA.

8 In ANA's Request No. 20, ANA seeks the same documents that were
 9 requested by UAL with respect to the SGHA. In response to UAL's similar
 10 request, ANA provided responsive documents. However, UAL has produced
 11 nothing.

12 **REQUEST NO. 20:**

13 Attach true and correct copies of all documents reflecting
 14 correspondence, negotiations, and interpretation of the SGHA
 between UAL and ANA in effect on the date of the Accident.

15 **UAL's RESPONSE TO REQUEST NO. 20:**

16 Objection; overly broad, unduly burdensome and potentially
 17 invasive of the attorney/client privilege and/or work product
 18 doctrines. Without waiving any objections, however, the GHHA
 19 in effect on the date of this accident, as indicated hereinabove,
 20 is already in possession of ANA as same was produced by
 21 ANA to United during the litigation. With regard to
 22 documents in addition to the agreement itself relating to the
 negotiations and interpretation of same, to the extent
 documentation exists, same will be produced under separate
 cover when located.

23 Turner Decl., Exhibit B.

24 In response to ANA's Request Nos. 30 through 34 seeking documents
 25 concerning the negotiation, selection, interpretation, and applicability of the terms
 26 and provisions of the SGHA, UAL did not produce a single document but
 27 "incorporates by reference its objections and response to Number 20 herein."

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1 Turner Decl., Exhibit B.

2 UAL's objections are unfounded. ANA's requests are specifically tailored
3 and in no way seek documents that would be protected by privilege or work
4 product. If there are documents for which UAL is claiming such privilege, then
5 UAL should provide a privilege log. Moreover, UAL seeks similar documents
6 from ANA, but refuses to produce its own. UAL's indication that documents "will
7 be produced under separate cover when located" is improper under Rule 34 of the
8 Federal Rules of Civil Procedure, which mandates responses to document requests
9 within thirty days. Counsel for UAL stated that UAL is searching for responsive
10 documents during numerous conversations and in various correspondence,
11 including during the meet and confer meetings on January 23 and 24, but UAL has
12 not produced a single piece of paper. *See* Turner Decl., Exhibit I.

13 In Request Nos. 21, 36, and 37, ANA seeks documents reflecting UAL's
14 contention that services provided by UAL's Ramp Tower G Controller were
15 provided under the SGHA. Turner Decl., Exhibit A. UAL did not produce a
16 single document in response to these requests, but instead refers to ANA's Cockpit
17 Voice Recorder and ANA's submission to the NTSB. Turner Decl., Exhibit B.
18 Despite the vast amount of evidence to the contrary, UAL continues to assert that
19 UAL's Ramp Tower G Controller provided services to ANA under the SGHA and
20 thus, the limitation of liability under the SGHA applies. If UAL has any document
21 that supports this claim, such document should be produced in response to these
22 requests immediately. The fact that UAL has failed to produce any document
23 relating to the SGHA supports ANA's position that the SGHA does not apply and
24 UAL has only asserted its applicability to harass ANA and to increase the costs of
25 this litigation. Accordingly, UAL's objections are unfounded and UAL should be
26 ordered to produce all responsive documents immediately.

27 In Request Nos. 19, 39, and 40, ANA seeks invoices from UAL to ANA for

1 services provided pursuant to the SGHA by UAL to ANA at SFO. Turner Decl.,
2 Exhibit A. UAL's boilerplate objections ("vague, ambiguous, overly broad and
3 unduly burdensome") are meritless because each Request is narrowly tailored to
4 seek specific documents. Furthermore, UAL's objection that documents
5 responsive to these requests "would already be in the possession or control of ANA
6 since they were the recipient of any such documents previously" is improper.
7 Turner Decl., Exhibit B. UAL is required to produce the documents in its control,
8 not to guess what documents are in the "possession or control" of ANA.
9 Moreover, UAL alleges that the SGHA applies to the Accident and UAL is
10 obligated to produce documents relevant to its allegations if intends to maintain its
11 affirmative defense based on the limitation of liability under the SGHA.

12 Accordingly, it is respectfully submitted that UAL should be compelled to
13 produce documents responsive to ANA's Request Nos. 19 through 21 and 30
14 through 40.

15 With the deposition of UAL's Rule 30(b)(6) Person Most Knowledgeable
16 ("PMK") on the SGHA scheduled for February 5, 2008, UAL's promise to produce
17 relevant documents, "to the extent such documentation exists," is disingenuous.

18 3. Other Requests

19 UAL did not produce a single document in response to any other Request
20 made by ANA, including documents concerning: (i) the provision of ground
21 handling and/or ramp control services (Request No. 1); (ii) ground collisions of
22 any UAL aircraft during pushback procedures (Request No. 13); (iii) the UAL
23 study of its Ramp Towers system-wide (Request No. 14); (iv) UAL procedural
24 changes resulting from or arising out of the Accident (Request No. 15); (v) the use
25 of wing walkers at SFO (Request No. 16); (vi) the existence and calculation of
26 UAL's alleged damages (Request No. 17); (vii) "approved United Air Lines hand
27 signals (NMOP)" (Request No. 18); (viii) aircraft marshalling (Request No. 22);

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(ix) hand signals for directing aircraft (Request No. 23); (x) taxiing (Request No. 24); (xi) potential conflicts with other aircraft prior to or during taxi (Request No. 26); (xii) the operation of Ramp Tower G at SFO (Request No. 27); (xiii) directing aircraft from Ramp Tower G at SFO (Request No. 28); (xiv) aircraft in Boarding Area G and surrounding non-movement areas at SFO (Request No. 29); (xv) maintenance and repair records of the aircraft operating as UAL Flight UA809 on October 7, 2003 (Request No. 41); and (xvi) repair and remediation performed on the aircraft operating as UAL Flight UA809 (Request No. 42). Turner Decl., Exhibit A.

In response to ANA's Request Nos. 15, 16, 18, 22, 23, 26, 27, 28, and 29, UAL stated that such documents will be produced "under separate cover when located." Turner Decl., Exhibit B. UAL has not produced a single document in response to these Requests to date. Pursuant to Rule 34 of the Federal Rules of Civil Procedure, responses to document requests are due within thirty of service. UAL has completely failed to comply with its obligations under the FRCP.

In response to ANA's Request No. 17 concerning the calculation of damages, UAL indicated that it would produce responsive documents pursuant to the "protective order." Turner Decl., Exhibit B. However, the only reason the "protective order" was not and is still not in place was and is because UAL has failed to provide ANA with the revised Confidentiality Order as it agreed to do on November 13, 2007 and as ordered by this Court on November 19, 2007. To this date, no responsive documents have been produced. *See* footnote 1, *supra*.

ANA's Request No. 24 and UAL's Answer are as follows:

REQUEST NO. 24:

Attach true and correct copies of all UAL manuals and documents that refer to taxiing including, but not limited to, policy, procedure, and training.

ANSWER

Objection; vague, ambiguous, overly broad and unduly burdensome.

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Without waiving any objection, if the intent of this request is to obtain United's protocols to be followed by its flight crew at SFO with regard to taxiing of aircraft in addition to applicable FARs.

Turner Decl., Exhibit B.

UAL's boilerplate objections are unfounded since this Request specifically seeks UAL documents related to taxiing, one of the central issues in this case. Moreover, the remainder of UAL's Answer is unintelligible. The response begins with an "if" clause, but no "then" follows.

Accordingly, it is respectfully submitted that UAL should be compelled to produce documents responsive to ANA's Request Nos. 1, 13 through 18, 22 through 24, 26 through 29, 41, and 42.

B. ANA's Second Set of Document Requests to UAL

1. UAL's "Self-Critical Analysis Privilege" Objection is Without Merit

UAL objects to many of the requests in ANA's Second Set of Document Requests on the grounds that the requests seek "information protected by the 'self-critical analysis' privilege." Turner Decl., Exhibit E. This objection is without merit. The claimed privilege is not well-settled law and, in any event, none of the requests seek documents protected by such privilege.

A majority of the Circuits, including the Ninth Circuit, have refused to recognize or apply the self-critical analysis privilege. *See Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) (declining to recognize the self-critical analysis privilege); *Union Pacific R. Co. v. Mower*, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000) (same); *In re Kaiser Aluminum and Chemical Co.*, 214 F.3d 586, 593 (5th Cir. 2000) (same); *Davis v. Kraft Foods North America*, 2006 WL 3486461 (E.D.Pa. Dec. 1, 2006) (court did not believe Third Circuit will recognize the privilege).

The self-critical analysis privilege only applies when "an intrusion into the self-evaluative analyses of an institution would have an adverse effect on the

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1 evaluative process, with a net detriment to a cognizable public interest.” *Flynn v.*
2 *Goldman, Sachs & Co.*, No. 91 Civ. 0035, 1993 WL 362380, at *1 (S.D.N.Y. Sept.
3 16, 1993). The privilege is intended to serve the public interest based on the notion
4 that the disclosure of documents reflecting candid self-examination will deter or
5 suppress socially useful self-evaluation or compliance with the law or with
6 professional standards. *Chemical Bank v. Affiliated FM Ins. Co.*, No. 87 Civ. 0150,
7 1994 WL 89292, at *1 (S.D.N.Y. Mar. 16, 1994).

8 To qualify for the privilege (1) the information must result from a critical
9 self-analysis undertaken by the party seeking protection; (2) the public must have a
10 strong interest in preserving the free flow of the type of information sought; and (3)
11 the information must be of the type whose flow would be curtailed if discovery
12 would be allowed. *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426
13 (9th Cir. 1992); *Chemical Bank*, 1994 WL 89292, at *1. UAL gives no
14 explanation of how responsive documents might qualify under any standard for
15 this privilege.

16 ANA’s requests seek documents concerning the UAL employees involved in
17 the actions of the respective aircraft on the day of the Accident and documents
18 reflecting UAL policies, procedures, and operations with respect to matters in
19 connection with the Accident. Documents responsive to these requests are not
20 subject to the privilege. UAL cannot satisfy the criteria established in *Dowling*,
21 which UAL cited as part of its objection.

22 In *In re Livent, Inc. Noteholders Sec. Litig.*, No. 98 Civ. 7161, 2003 WL
23 23254 (S.D.N.Y. Jan. 2, 2003), the Southern District of New York rejected the
24 privilege’s application to performance reviews of employees, noting that the
25 documents would show whether the employees were properly trained and whether
26 the company followed proper procedures. UAL improperly attempts to assert the
27 privilege with respect to the same type of information.

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1 It is respectfully submitted that UAL's objections based on the "self-critical
2 analysis privilege" are without merit and that UAL should be compelled to produce
3 any document which it is withholding subject to this claim of privilege.

4 **2. Requests for Documents Concerning UAL Policies & Procedures**

5 ANA requested documents concerning UAL policies, procedures, and
6 operations for all actions relevant to the Accident, including but not limited to
7 Ramp Tower G, pushback, and taxi. Turner Decl., Exhibit D. UAL has not
8 produced any responsive document.

9 In its Second Set of Document Requests to UAL, Request Nos. 1, 8, 9, 10,
10 15, 16, 17, 18, 19, and 20 request documents concerning UAL's policies,
11 procedures, and operations concerning: (i) clearances and instructions for pushback
12 and taxi; (ii) maintaining separation of aircraft in the vicinity of Terminal G; (iii)
13 ensuring that no collisions occur between aircraft; (iv) organizing and expediting the
14 flow of traffic; (v) paying attention to all aircraft and not focusing on one area to the
15 exclusion of another; (vi) clearing potential conflicts between aircraft prior to or
16 during taxi; (vii) clearing potential conflicts between aircraft prior to or during
17 pushback; (viii) determination of number and position of wing walkers during
18 pushback; (ix) Ramp Tower G Ramp Controller procedures prior to, during, and after
19 issuance of clearance to push, clearance to taxi, and clearance to Spot 10 instructions;
20 (x) pushback and taxi operations of UAL B777 aircraft into and out of SFO; (xi)
21 responsibility for safe dispatch and clearance; and (xii) stopping pushback when there
22 is a question about clearance. Turner Decl., Exhibit D.

23 In response to many of the foregoing requests, UAL refers to its Ramp Service
24 Driving Rules, Maintenance Handling Manual, flight manual, and flight operations
25 manual which it produced one or two days before the commencement of the
26 depositions of its employees in addition to boilerplate objections. Turner Decl.,
27 Exhibit E, Request Nos. 1, 8, 9, 15, 16, 18, and 19. However, these documents do

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1 not address the specific issues listed above and are not responsive to ANA's requests.

2 In response to Request Nos. 10, 17, and 20 concerning UAL policies and
3 procedures, including but not limited to pushback, taxi, and Ramp Tower G
4 operations, UAL makes boilerplate objections, claims various privileges, and states
5 that "United has not located any documents responsive to this Request." Turner
6 Decl., Exhibit E. UAL does not indicate whether any document responsive to any of
7 these requests actually exists. *Id.* If no document exists, UAL should say so. If
8 UAL is still looking, UAL should say so. If UAL is withholding documents based on
9 privilege, UAL should produce a privilege log.

10 While ANA believes many of the foregoing issues have no relevance to the
11 Accident, they all relate to issues that UAL has raised in this litigation, relevant or
12 not. It is respectfully submitted that UAL should be compelled to produce all
13 documents in their possession, custody, or control that are responsive to these
14 requests.

15 **3. Requests for Documents Concerning UAL Employees**

16 ANA seeks the training records and training materials of the UAL
17 employees involved in the Accident. Turner Decl., Exhibit D. In ANA's Request
18 Nos. 2 through 7, ANA requests these documents with respect to UAL's three
19 pilots, ramp controller, and tug driver. Turner Decl., Exhibit D. ANA further seeks
20 documents concerning any examination or test on tug driver Julio Hernandez for
21 fitness of duty on the day of the Accident in Request No. 21. Turner Decl., Exhibit
22 D.

23 In response to these requests, UAL makes boilerplate objections and claims
24 that it has produced the personnel files of each individual. Turner Decl., Exhibit E.
25 However, it was not until the eve of their depositions that ANA received some
26 documents concerning the ramp controller, Edward Loh, and two of the three
27 pilots, Scott Russell and Brad Powell. ANA has received no documents regarding

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1 the tug driver Julio Hernandez or the SGHA Rule 30(b)(6) PMK witness Mike
2 Gentile.

3 The "personnel file" produced for each of Scott Russell and Brad Powell of
4 UAL's crew failed to include their certificates or the requested training materials.
5 UAL has produced only records of some "proficiency checks" for these pilots.
6 UAL has produced no training material and specifically nothing with respect to
7 "clearing potential conflicts with other aircraft prior to or during taxi" or "clearing
8 potential conflicts with other aircraft prior to or during pushback." Turner Decl.,
9 Exhibit E.

10 UAL further makes a vague reference to "private information protected
11 under California law." Turner Decl., Exhibit E. UAL provides no specific citation
12 for such law nor describes its actual application. *Id.* UAL's response is contrary to
13 its assertion in UAL's Reply to ANA's Opposition to UAL's Motion to Compel
14 Discovery and for Additional Time to Depose Witnesses (Doc. No. 48), in which
15 UAL argues, "any privacy concerns are alleviated by the fact that the records will
16 be produced under the protective order... which specifically covers personnel
17 files." Presumably this reference to a protective order is the same Order that UAL
18 has still not presented to the Court after UAL's counsel's delays have now
19 exceeded three (3) months. UAL Reply, pages 5-6. Moreover, UAL fails to show
20 how California law applies to employment files located in Chicago, Illinois.

21 It is respectfully submitted that UAL should be compelled to produce
22 documents responsive to ANA's requests concerning UAL's employees, who were
23 directly involved in the events which are the subject of this litigation.

24 **4. Other Requests**

25 UAL did not fully respond to other Requests made by ANA in ANA's
26 Second Set of Document Requests, including documents concerning: (i) the current
27 UAL operations manual applicable to its B777 aircraft (Request No. 12); (ii)

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1 changes in the UAL operations manual applicable to ground operations of its B777
2 aircraft after October 7, 2003 (Request No. 13); and (iii) dispatch documents for
3 Flight UA809 on October 7, 2003, including but not limited to flight plan and
4 assigned altitude (Request No. 30). Turner Decl., Exhibit E.

5 ANA's Request Nos. 12 and 13 seek versions of UAL's operations manual,
6 including the current manual and any documents reflecting changes in the manual.
7 In response to Request No. 12, UAL asserts that it "will produce a copy of the
8 flight operations manual to Plaintiff." Turner Decl., Exhibit E. While on the eve of
9 the depositions of UAL's pilots on January 18, 2008, UAL produced manuals that
10 were in effect at the time of the Accident, no changes since the Accident have been
11 produced. UAL states that it "has not located any documents" in response to
12 Request No. 13. Turner Decl., Exhibit E. UAL should be compelled to provide any
13 document not produced in response to these requests for manuals, procedures, and
14 training at least with regard to relevant subjects including pushback, taxi, and
15 communications with Ramp Tower G.

16 In response to ANA's Request No. 30 concerning the dispatch of Flight
17 UA809, UAL makes boilerplate objections, claims various privileges, and states that
18 "United has not located any documents responsive to this Request." Turner Decl.,
19 Exhibit E. UAL does not indicate whether any document responsive to any of these
20 requests actually exists. If no document exists, UAL should so state. If UAL is still
21 looking, UAL should so state. If UAL is withholding documents based on its
22 objections, UAL should so state. UAL should be compelled to clarify its responses
23 and produce any responsive documents. In fact, all three UAL pilots testified on their
24 recent depositions that on January 21, 2008, they reviewed documents including the
25 flight plan in preparation for their depositions. Turner Decl., Exhibit H, 103:4-9.
26 Days later, UAL's counsel stated that he would produce the flight plan "if it was still
27 available." UAL should not be allowed to continue its game of "hide the ball."

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1 Turner Decl., Exhibit I.

2 Accordingly, it is respectfully submitted that UAL should be compelled to
3 provide full and unambiguous answers and all responsive documents in response to
4 ANA's Request Nos. 12, 13, and 30 in ANA's Second Set of Document Requests to
5 UAL.

6 **C. ANA's Document Requests Contained In Its Deposition Notices**

7 More than 30 days before their depositions, ANA served Notices of
8 Deposition and document requests addressed to UAL employees who were
9 involved in the events surrounding the Accident, including Captain John Rediger,
10 First Officer Scott Russell, Relief Pilot Brad Powell, ramp controller Edward Loh,
11 and tug driver Julio Hernandez. Turner Decl., Exhibit F. In response to these
12 requests, UAL provided baseless objections, referred to documents which are not
13 responsive to the requests, and referred to documents which UAL has failed to
14 produce. Turner Decl., Exhibit G.

15 UAL provided limited "personnel files" for John Rediger, Scott Russell,
16 Brad Powell, and Edward Loh. The documents produced are generic employment
17 documents and proficiency documents which are not responsive to ANA's specific
18 requests.

19 The deposition of UAL's tug driver Julio Hernandez was scheduled for
20 January 17, 2008, but, due to medical reasons, has been postponed indefinitely.
21 Turner Decl., Exhibit F. However, while UAL refers to the "personnel file" for
22 Julio Hernandez, UAL has not produced a single document related to Mr.
23 Hernandez. Turner Decl., Exhibit I.

24 UAL claimed to have provided Captain Rediger's file well before his
25 deposition, but only limited documents were produced on the morning of his
26 deposition. Captain Rediger testified that on the day of the Accident, he filled out
27 a Flight Safety Awareness Program report concerning the incident on UAL's

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1 website, Skynet. Turner Decl., Exhibit H, 89:17-90:10. He also testified that he
 2 had a file concerning the Accident at home which contains notes he made in
 3 preparing his statement. Turner Decl., Exhibit H, 88:11-24. ANA requested these
 4 documents but UAL has not produced them. Turner Decl., Exhibit I.

5 UAL has made numerous references to ANA and this Court about the
 6 circumstances surrounding the SGHA, but not a single piece of paper has been
 7 produced or even identified, even though the deposition of the Rule 30(b)(6) PMK
 8 Michael Gentile is scheduled for February 5, 2008.

9 It is long past time for UAL to give up its objections based on attorney
 10 work-product, attorney-client privilege, self-critical analysis privilege, and broken
 11 promises that it will produce unspecified documents at unspecified times. UAL
 12 should be compelled to produce the documents requested and precluded from
 13 referring to any document that was not timely produced.

14 **D. Costs**

15 It is respectfully submitted that pursuant to Rule 37 of the Federal Rules of
 16 Civil Procedure, ANA is entitled to the expenses and fees incurred in bringing the
 17 instant motion.

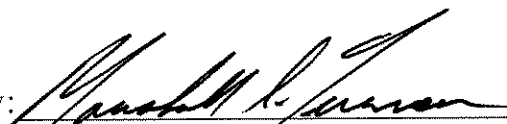
18 **III. CONCLUSION**

19 In light of the foregoing, ANA respectfully submits that ANA's Motion to
 20 Compel should be granted in all respects and that costs and fees of this motion
 21 should be awarded to ANA.

22 Dated: February 1, 2008

CONDON & FORSYTH LLP

24 By:


 25 MARSHALL S. TURNER (*pro hac vice*)
 SCOTT D. CUNNINGHAM

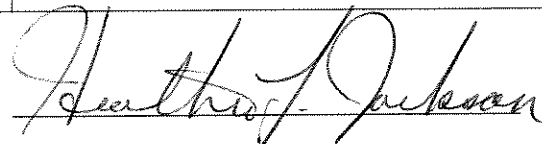
26 Attorneys for Plaintiff and Counter-Defendant
 27 ALL NIPPON AIRWAYS COMPANY, LTD.

CERTIFICATE OF SERVICE


NOTICE OF MOTION AND MOTION OF ALL NIPPON AIRWAYS
COMPANY, LTD. COMPEL DISCOVERY; MEMORANDUM OF POINTS
AND AUTHORITIES; DECLARATION OF MARSHALL S. TURNER

I, hereby certify that on February 1, 2008, I electronically filed the foregoing
paper with the Clerk of the Court using the ECF System which will send
notification of such filing to the following:

Scott R. Torpey, Esq. Jaffe, Raitt, Heuer & Weiss 2777 Franklin Road, Suite 2500 Southfield, MI 48034-8214 Phone: (248) 727-1461 Fax: (248) 351-3082	Attorneys for defendant
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HEATHER L. JACKSON

Sworn to before me this
1st day of February, 2008


Notary Public

Timothy H Eskridge
Notary Public State of N.Y.
02ES6121835
Qualified in New York County
Commission Expires January 31 2009

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